Supreme Court, U.S.
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No. 98-1253

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

CERAMICA NUOVA D'AGOSTINO, S.p.A.,

Petitioner,

v.

MCC-MARBLE CERAMIC CENTER, INC.,
(No Parent or Subsidiary Corporations)

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent MCC-Marble disagrees with Petitioner D'Agostino's characterization of the evidence offered concerning the parties' subjective intent as conclusory and without supporting facts. For example, the affidavit of Gianni Silingardi, contained in Petitioner's appendix at 53a, contained underlying facts which support his conclusion that neither party to the transaction intended the printed terms on the reverse of the purchase order form to be included in their agreement. The Court is reminded that Mr. Silingardi was D'Agostino's representative who negotiated this transaction with MCC-Marble's president.

One of the underlying facts which supports Mr. Silingardi's conclusion as to the parties' subjective intent is that the terms on the reverse of the order form, which were printed in the Italian language, were not translated for MCC-Marble's representative, Mr. Monzon. Mr. Monzon's affidavit established that he did not speak Italian. Mr. Silingardi

stated in his affidavit that he "did not ask Sig. Copelli to translate for Mr. Monzon the terms of that order form, since the purpose of the written form was to memorialize the quantity, quality, description, price and payments terms of the oral agreement, for convenience." App. 55a ¶ 11. The absence of a translation of the Italian terms is underlying evidence supporting the conclusion that those terms were not supposed to be part of the agreement between the parties. If the terms were to be included, one of the parties would have asked that they be translated.

Another form of underlying evidence supporting Mr. Silingardi's intent on behalf of D'Agostino not to include the terms on the reverse of the order form is Italian trade practice. Mr. Silingardi's affidavit stated: "under Italian trade practice, the terms on the reverse of a *Proposta* form are not applicable unless specifically included by hand-written reference on the face of the form." App. 55a ¶ 12. Mr. Silingardi's intent on behalf of D'Agostino that the terms on the reverse of the order form not be included is supported by

the underlying evidence of Italian trade practice. Therefore, contrary to Petitioner's characterization, the evidence offered concerning the parties' subjective intent was not conclusory and unsupported by underlying facts.

ARGUMENT

I.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO DEMONSTRATE CONFLICT--REAL OR IN PRINCIPLE--BETWEEN THE ELEVENTH AND THE FIFTH CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW

A. Introduction:

Petitioner's three argument headings do not assert any conflict, do not suggest that this case involves an area of law which needs this Court's guidance, and do not argue that the decision below will have broad impact upon the nation. Petitioner's argument headings instead only assert that the Eleventh Circuit erred in holding that no parol evidence rule exists under the CISG, and in other holdings. MCC-Marble

strenuously disagrees that the Eleventh Circuit committed any error. (MCC-Marble will address the correctness of the rulings in the second section of this brief.) But even if Petitioner were correct and the alleged errors were committed, such errors alone would not warrant granting certiorari.

While a petition for certiorari properly describes the errors of law alleged to have been made in the decision, such error alone is not often sufficient to warrant certiorari review. The purpose of a certiorari petition "of persuading the Court to hear a case is rarely achieved merely by arguing that the decision below is erroneous." Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, Supreme Court Practice § 6.31 at 373 (6th ed. 1986).

Although absent from Petitioner's argument headings, the subject of conflict is mentioned within the body of the first argument which asserts that the Eleventh Circuit erred. See petition at 12. However, the alleged conflict is not one which warrants this Court's acceptance of this case.

First, there is no conflict--real or in principle--between the Eleventh Circuit's decision and that of the Fifth Circuit. Second, even if there were some possible conflict in principle discernible, that conflict is not on a matter of federal law which requires the oversight of this Court.

B. The Circuits Are Not in Conflict:

There is no true conflict between the decision under review and the Fifth Circuit's decision in Beijing Metals & Minerals Export Import Corp. v. American Business Center, Inc., 993 F.2d 1178 (5th Cir. 1993). The Fifth Circuit's decision in Beijing Metals indicates that the applicability of the parol evidence rule to CISG case was taken as a given, not briefed and decided.

The parties in Beijing Metals were described by the Fifth Circuit as MMB and ABC. Both MMB and ABC apparently recognized the applicability of the parol evidence to their case.

MMB was the Plaintiff in Beijing Metals and was suing

ABC under a written agreement. ABC sought to use two oral argreements in defense of MMB's claim. MMB's position that the parol evidence rule applied to the case in apparent from its position that the two oral agreements did not constitute a legal defense to its claim.

ABC conceded that the parol evidence rule applied to fully integrated written contracts under the CISG, as is apparent from ABC's position "that MMB's claim is governed by the United Nations Convention on Contracts for the International Sale of Goods" and ABC's "ug[ing] that [the Fifth Circuit] apply the parol evidence rule applicable to the sale of goods, which, unlike the common law, does not presume that an apparently complete writing is a total integration." Beijing Metals, supra, at 1182-83 & nn 9 & 10 (emphasis added).

The issue in Beijing Metals was not whether the parol evidence rule applied to CISG cases. The issue instead was whether the written contract was a complete integration. ABC argued--not that the parol evidence rule was absent

from CISG cases--"that the payment agreement [between ABC and MMB] is incomplete," and not subject to the parol evidence rule, even where that rule exists under the law. See id. at 1183. Thus, the applicability of the parol evidence rule under the CISG was not a litigated issue in Beijing Metals, and there is no true conflict such as would warrant certiorari review under authorities like Insurance Corp. v. Companie Des Bauxites, 456 U.S. 694 (1982) (reviewing Third Circuit's decision acknowledging contrary holding by Fifth Circuit and expressing disagreement with that decision).

This is not a case in which the Fifth Circuit's casual comment--that the parol evidence rule "applies regardless" of whether Texas law or the CISG applied--rises to the level of a "conflict in principle" sufficient to warrant certiorari review, as in cases like Oregon Dept. of Fish & Wildlife v. Klamath Tribe, 473 U.S. 753, 764 (1985). As noted by the Eleventh Circuit in the present case, "the Fifth Circuit did not undertake to interpret the CISG in a manner that would arrive at a result consistent with the parol evidence rule." App. 16a,

144 F.3d at 1390. The Fifth Circuit and the parties in Beijing Metals simply assumed the applicability of the parol evidence rule. The Fifth Circuit made no expression of principle sufficient to warrant conflict review.

Even if the Eleventh Circuit and the Fifth Circuit were squarely in conflict on the controlling point of law, that conflict would not warrant certiorari in this case. Petitioner cites Braxton v. United States, 500 U.S. 344 (1991). But Braxton notes that such conflict must be a conflict on a matter of federal law. An assumed conflict on this question of international law is less worthy of certiorari review than would be a question of federal law, because of the difference in roles which this Court has in resolving conflicts of federal domestic law.

In matters involving federal domestic law, this Court is undeniably the supreme authority in all the world. Its decisions are correct because there is no higher authority. However, this Court is not the highest in the world on questions involving international law like the CISG. Instead,

this Court is on a equal footing with the highest courts of other signatory jurisdictions under the convention. This Court's opinion whether the parol evidence rule exists under the CISG is no more right or wrong than that of the high court of another jurisdiction.

As noted by the Eleventh Circuit in the decision under review, "a wide number of other states party to the CISG have rejected the [parol] rule in their domestic jurisdictions." 144 F.3d at 1391, App. 19A. Absent decisions from courts in those nations whether the CISG contains a rule in conflict with domestic law in their nations, this Court should deny certiorari and await further development of the law elsewhere. Unlike in cases involving domestic federal law, this Court's decision on the point would not be the last word on the question, so certiorari should be denied.

II.

THIS COURT SHOULD DENY CERTIORARI BECAUSE, EVEN IF THE CIRCUITS HAVE EXPRESSED A CONFLICT IN PRINCIPLE, THE ELEVENTH CIRCUIT'S DECISION IS CORRECT AND WILL LIKELY BE FOLLOWED

This Court should deny certiorari even if it determines that the circuits have expressed a conflict in principle on a matter of importance to the federal system of justice, because the Eleventh Circuit's well-reasoned and researched decision is the correct one on the point and will likely be followed by other courts deciding the issue. The weight of authority convincingly establishes that there is no parol evidence rule in cases under the CISG.

Unlike the law of many domestic jurisdictions, the law under the CISG is that extrinsic evidence is admissible to vary or contradict even unambiguous provisions in a written contract. In cases like this one under the CISG, it is up to the trier-of-fact to hear all the evidence of the parties' dealings and then to determine what terms the parties

intended their agreement to contain.

There is no express parol evidence rule in the CISG E.g., I Albert Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, Index at 28 (1994 Supp.)(hereinafter "Kritzer's Guide to CISG")("Parole [sic] evidence rule [Convention has none]")(second brackets in original). And there is nothing like the parol evidence rule which is part of the CISG by implication, common law, or usage.

The overall spirit of the CISG is that all relevant evidence bearing on the parties intentions is admissible, whenever there is a disagreement as to the terms of a contract. To begin with, Article 11 of the Convention provides that "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." (emphasis added). Implicit in that article is the idea that the contract may be proved by a combination of writings and witnesses, without limitation by

domestic notions of the role of parol to explain unclear provisions.

As noted by the Eleventh Circuit in its decision under review, Article 8, the article which establishes the standard for interpretation of contracts under the Convention, "sets forth a 'subjective' standard" of interpretation where the other party to a contract "knew or could not have been unaware what the intent was." I Kritzer's Guide to CISG at 124. In the present case, the affidavits of Gianni Silingardi and Gianfranco Coppelli establish that D'Agostino knew that MCC-Marble's president intended that the parties' agreement did not include the Italian terms on the back of the order forms.

As noted in Kritzer's Guide to CISG, there is no implied parol evidence rule under the Convention, so if parties entering into contracts hope to exclude resort to extrinsic evidence to vary or contradict the terms of a seemingly-unambiguous writing, they will "wish to consider the use of a 'merger' or 'integration' clause." Id. at 125.

A good discussion of the effect of the absence of a parol evidence rule from the CISG is that of Professor John Honnold, in his work entitled Uniform Law for International Sales Under the 1980 United Nations Convention (2d ed. 1991) (hereinafter "Uniform Law for International Sales"). That discussion notes the absence of a "parol evidence rule" from the CISG, and states that such a rule "would have mystified jurists from legal systems that have no such rule." Id. at 170.

> Professor Honnold notes in pertinent part as follows:
>
> [T]he language of Article 8(3) that "due consideration is to be given to all relevant circumstances of the case" seems adequate to override any domestic rule that would bar a tribunal from considering the relevance of other agreements. . . . [While judges deciding CISG cases still will give great weight to written contracts,] . . . Article 8(3) relieves tribunals from domestic rules that might bar them from

'considering' any evidence between the parties that is relevant. This added flexibility for interpretation is consistent with a growing body of opinion that the 'parol evidence rule' has been an embarrassment for the administration of modern transactions." Id. at 170-71 (emphasis added).

Most other scholarly writers addressing the subject have rejected d'Agostino's necessary premise that the parol evidence rule bars courts from considering evidence which contradicts the terms of written agreements under the CISG. Professor Harry Fletchner, in his article entitled More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price Under Article 50, 14 J.L. & Com. 153 (1995), argues that the reason to reject the parol evidence rule in CISG cases is "[b]ecause the special procedures and tests we call the parol evidence rule are confined to common law systems, where they arose in response to problems unique in those systems, their application to transactions governed by CISG would be inconsistent with the principles stated in Article 7(1)." Id. at

158-59(emphasis added and footnote deleted).

In his article entitled An Essay on the Formation of Contracts for the International Sale of Goods, 8 J.L. & Com. 11 (1988) John E. Murray, Jr. agrees that the "CISG rejects the parol evidence rule in the most frugal terms." Id. at 14.

Peter Winship has also indicated that the parol evidence rule is inconsistent with Article 8(3) of the Convention, in Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention, 37 Loy. L. Rev. 43, 57 (1991). Accord, Ronald A. Brand & Harry M. Fletchner, Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention, 12 J.L. & Com. 239, 251 (1993)) ("By requiring consideration of 'all relevant circumstances'--including 'negotiations'--without excepting situations where the parties embodied their agreement in a writing, [article 8(3)] does overrule certain traditional applications of the parol evidence rule").

Of course in most cases it will be quite difficult to

convince the trier-of-fact to disregard the terms of a writing signed after or at the time of a contradictory oral agreement. See generally, e.g., id. at 252 (basic principle that writings should be more highly regarded than contradictory oral agreements should remain viable under the CISG). But the present case was decided on summary judgment, so the weight to be given to respective types of evidence was not the issue.

The most persuasive authority for the proposition that there is no parol evidence rule under the CISG is the Convention's legislative history. One researcher has traced that history as follows:

> During the seventh meeting of the First Committee, the Canadian representative proposed the addition of a new paragraph to current article 11. See U.N. Conference on Contracts for the International Sale of Goods, 1st Comm., 7th mtg., ¶ 82, at 270, U.N. Doc.

A/CONF.97/19 (1980), in HONNOLD DOCUMENTARY HISTORY, supra note 1, at 491. The new paragraph would have restricted the admissibility of testimony contradicting a written contract. Report of the First Committee, U.N. Conference on Contracts for the International Sale of Goods, 1st Comm., art. 10, ¶ 3, at 90, U.N. Doc. A/CONF.97/19 (1980), in HONNOLD DOCUMENTARY HISTORY, supra note 1, at 662.

The proposed paragraph read:

> Between the parties to a contract of sale evidenced by a written document, evidence by witnesses shall be inadmissable for the purpose of confuting or altering its terms, unless there is prima facie evidence resulting from a written document from the

opposing party, from his evidence or from a fact the existence of which has been clearly demonstrated. However, evidence by witnesses shall be admissible for purposes of interpreting the written document. Id. ¶ 86.

David H. Moore, The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 1995 Brigham Young L. Rev. 1347, 1349 n.5 (noting that the parol evidence "rule was not explicitly rejected by the Committee," only the Canadian proposal).

The almost unanimous scholarly treatments of the CISG should be especially persuasive, in light of the dearth of case authority under the Convention. "Because there is virtually no caselaw under the Convention, we look to its language and to the 'general principles' upon which it is based." Delchi Carrier S.p.A. v. Rotoriex Corp., 71 F.3d 1024, 1027-28 (2d Cir. 1995) (citing CISG Art. 7(2)).

Beijing Metals & Minerals Import/Export Corp. v. American Business Ctr., Inc., 993 F.2d 1178 (5th Cir. 1993) did not analyze the question whether the parol evidence rule exists under the CISG. As noted in the preceding argument section, the applicability of the rule was simply taken as a given by the parties and the court in that case.

In conclusion on this point, unlike most cases involving domestic law, the determination of whether the Eleventh Circuit was correct is not a determination of how most American courts would decide the issue, nor one of how the case should be decided to comport with domestic principles of law. Instead, the question devolves to one of what the high courts of other participating nations would do if faced with the same question, to comport with principles of international law which underlie the CISG.

The Eleventh Circuit noted in its decision that "although jurisdictions in the United States have found the parol evidence rule helpful to promote good faith and uniformity in contract, as well as an appropriate answer to the

question of how much consideration to give parol evidence, a wide number of other States Party to the CISG have rejected the rule in their domestic jurisdictions. " 144 F.3d at 1391, App. 19a. Those other jurisdictions would likely hold that the parol evidence rule likewise is absent from cases under the CISG. The Eleventh Circuit's decision is correct and likely to be followed by other American courts in the future. Therefore, certiorari should be denied.

CONCLUSION

WHEREFORE, there being no conflict between the Circuits, there being no question of federal law involved, and the decision of the Eleventh Circuit being correct and likely to be followed by the courts in the future, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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